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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/911,945

Filing Date: July 23, 2001

Appellant(s): KIKINIS, DAN

Donald R. Boys
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 4, 2007 appealing from the Office action mailed May 5, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,812,545 Liebowitz et al.

09-1998

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

A. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

B. Claims 8-9 and 13 are rejected under 35 U.S.C. 102(e) as being anticipated by Mendelson et al., USPN 5,754,783 (hereafter referred to as Mendelson).

C. Regarding claims 8 and 13, Mendelson taught a broadband data transmission system (abstract) comprising:

a high priority queue reserved for data entities requiring that data entities be transmitted in a successive fashion at or above a minimum rate to insure no interruptions (column 2, lines 50-53, 63-67, column 6, lines 50-54);

a lower priority data entity queue (column 6, lines 50-54); and
control routines adapted for dividing large data entities in the lower priority queue
into multiple smaller data entities of a size that may be interspersed with the
transmission of data entities from the high priority queue without causing the rate of

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transmission of the high priority entities to fall below the minimum rate (column 6, lines 23-26, column 8, lines 1-19).

D. Regarding dependent claim 9, Mendelson taught the transmission system comprises a satellite transmission system (column 4, lines 28-31).

Claim Rejections - 35 USC § 103

E. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

F. Claims 10 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mendelson in view of Liebowitz et al., USPN 5,812,545 (hereafter referred to as Liebowitz).

G. Regarding dependent claims 10 and 14, Mendelson taught upon dividing a large data entity into multiple smaller data entities for transmission, the control routines enable reassembling the multiple data entities back into the undivided larger data entity (column 1, lines 37-38, column 2, lines 12-15). Mendelson does not specifically teach preparing a division key for transmission to a user, the division key adapted to aid in reassembling the multiple data entities back into the undivided larger data entity. However, Liebowitz taught preparing a division key for transmission to a user, the division key adapted to aid in reassembling the multiple data entities back into the undivided larger data entity (column 4, lines 58-63). It would have been obvious to one

of ordinary skill in the art at the time the invention was made that incorporating Liebowitz's division key in Mendelson's system for interleaving secondary data would have increased system robustness. The motivation would have been to reduce the complexity associated with decoding the transmitted stream.

(10) Response to Argument

Appellant argues – “Firstly, appellant points out the burden placed on the appellant when an Examiner rejects claims merely citing page and line numbers with no added comment actually relating the cited teaching with appellant’s claim limitations.”

On February 28, 2006, Appellant responded to the office action which first cited Mendelson as prior art. Appellant did not indicate further explanation was necessary. If Appellant had done so at that time further explanation could have been provided. The rejection is made with the assumption that Appellant's representative possesses a minimum competency in this art.

Appellant argues – “[T]hat Mendelson fails to teach a system for transmitting packets on a broadband network.”

First, Appellant admits that Mendelson taught a “transport stream” (page 6, lines 25-28) which is composed of packets according to Mendelson on column 4, lines 49-51. Second, Appellant admits that the “transport stream” is delivered over network 130. Lastly, network 130 operates using ATM (asynchronous transfer mode protocol) with indicates that network 130 is a broadband network.

Appellant argues – “Appellant’s invention is not limited by software and takes place at the level of actual packet transmission on the network, not inside the compression step, as in Mendelson.”

According Appellant’s specification on page 8, lines 22-23, the control routines are software and this directly contradicts Appellant’s argument. In the Background of the Invention section of Mendelson, we are taught that MPEG is a compression standard (column 1, lines 63-66). After compression, the MPEG transport stream is partitioned into fixed size transport stream packets (column 2, lines 1-4). Therefore, Mendelson does not perform “interleaving” during the compression step.

Appellant argues – “[T]hat Mendelson does not deal with the problem of the need to send additional real data to a user interspersed in a broadband transmission requiring minimum bandwidth so transmission is not interrupted.”

Mendelson explains that delivering timed content, such as video, at a constant rate is important. If the delivery is too slow, i.e. under a minimum rate, the program is delayed, i.e. interrupted (see column 2, lines 50-55).

Appellant argues – “In contrast, appellant’s invention teaches dividing the second entity into multiple portions, each portion small enough to ensure that it may be transmitted interspersed with first data entities without violating the minimum rate for the first data entities.”

In the next paragraph, Appellant admits “[t]he secondary content is then interleaved in a linear manner into a data stream generated from the primary content buffer 412 in order to maintain the constant bit rate.” The minimum rate for Mendelson’s system is the constant bit rate (CBR). In fact, Mendelson describes the constant bit rate as a minimum rate in column 5, lines 41-45.

Appellant argues – “Mendelson does not resize data packets from a lower priority queue to insert in a data stream from a higher priority queue in order to send needed data to a user receiving the data stream from the higher priority queue.”

Appellant’s specific claim language is “dividing large data entities in the lower priority queue into multiple smaller data entities of a size that may be interspersed with the transmission of data entities from the high priority”.

Appellant argues – “Appellant describes in the background portion of the specification that present invention is an alternative to compression because compression of files is sometimes used as a technique to enable faster download times, ...”

Mendelson taught using video encoded in an MPEG or compression format. Thus, the interleaving of the secondary content within the primary content as termed by Mendelson is not the compression of the content itself. Therefore, Appellant’s point is moot.

Appellant argues – “In Mendelson the secondary content must be video related text or a stationary graphic which is viewed along with the video stream at the user’s end.”

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., independent data entities) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Also, Mendelson taught the secondary content comprises “other private data”; private data is independent of the primary data, i.e. the video stream.

Appellant argues – “Mendelson actually pads packets containing video content and does not resize existing packets to fit in satellite transmission, as claimed.”

“Resizing existing packets” is not in Appellant's claim language, however, “resizing data entities” is. The scope of “resizing data entities” includes “resizing” second content to pad primary content packets because “data entities” are not necessarily packets. When considering Mendelson, Appellant ignores that the secondary content is “resized” to pad the primary content packets.

Mendelson taught the network 130 is an ATM network wherein data is transmitted in fixed size packets. To transmit the secondary content without Mendelson's invention, the packet size is fixed and the data bits representing the

content in each packet is fixed. By using Mendelson's invention, the secondary content is resized (i.e. the number of bits is varied) to add to packets with primary content.

Appellant argues – “Appellant argues that there is absolutely no motivation in the art provided by the Examiner to provide a division key because there is no need in Mendelson to re-assemble resized packets at the receivers end.”

By padding the primary content with a variable number of data entities from the secondary content, the second content is no longer in its original form. Mendelson taught that after transmission across a network, content must be reassembled (column 2, lines 12-15). Liebowitz taught a specific mechanism for reassembling the primary content and the secondary content.

Appellant argues – “The reasoning for the combination cannot be made in this case without the Examiner's hindsight knowledge of the teaching of the Appellant's invention.”

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA

1971). The Examiner did not need hindsight for motivation because Mendelson explicitly teaches that reassembling content after transmission across a network is necessary, see column 2, lines 12-15.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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